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### Law and Politics after Wightman: Taking Stock of Neo-Formalism in the EU

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UNIVERSITY OF AMSTERDAM



CENTRE FOR THE STUDY OF  
EUROPEAN CONTRACT LAW

LAW AND POLITICS AFTER WIGHTMAN  
TAKING STOCK OF NEO-FORMALISM IN THE EU

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**LAW AND POLITICS AFTER *WIGHTMAN***  
**TAKING STOCK OF NEO-FORMALISM IN THE EU**

**Marija Bartl & Keiva Carr**

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**I. Introduction**

Hans Micklitz is, on many accounts, a renaissance scholar. Versed in scholarship across geographies, times and disciplines, with academic productivity that few can match. Despite his many pursuits, Hans has always been the most generous and committed supervisor. He has motivated his students to read broadly, think deeply and be ambitious in their scholarship. His thoughtful supervision has moved many of us beyond our intellectual boundaries: we remain deeply grateful to Hans for his guidance during the most vulnerable, and the most beautiful, period of our lives.

When we started thinking about this contribution, we asked what brings Hans, Keiva and Marija together? Two things sprang to mind. Firstly, our commonly held commitment to the EU project. While unquestionably critical observers of the EU, we all remain deeply concerned with its fate, intellectually and emotionally. It is for this reason that the CJEU's decision in *Whitman and Others*,<sup>1</sup> the most recent pronouncement on Brexit, issued mere weeks prior to the submission of this contribution, could not but form the object of our attention herein. Secondly, we also keenly remembered the piece of scholarship that Hans encouraged us to read and re-read - Duncan Kennedy's "Three Globalisations of Legal Thought"<sup>2</sup> – a piece that has ultimately found its way into the scholarship of all of us.

In this contribution then we, somewhat playfully, ask if there is anything we can learn from

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<sup>1</sup> Case C-621/18, *Andy Wightman and Others v Secretary of State for Exiting the European Union*

<sup>2</sup> D. Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," *The New Law and Economic Development: A Critical Appraisal* (2006).

reading *Whitman and Others*<sup>3</sup> through the prism of Kennedy's Three Globalisations of Legal Thought. In order to undertake this analysis, we will first, in Part II, set out the fundamental characteristics of Classical Legal Thought, The Social and Neo-Formalism. We then discuss the judgment *Wightman and Others*<sup>4</sup>, before proceeding to analyse the judgment in light of Kennedy's Three Globalisations in Part IV. The main issue that we aim to shed light on is the relation between *law* and *politics* in the EU after *Wightman*. We will explore different legal consciousnesses that seem to co-exist in this judgment, each of which re-establishes the relationship between law and politics in the EU.

## II. The Three Globalisations of Legal Thought

Following Kennedy, our employment of 'globalisation of legal thought' conjures a historical legal consciousness, which includes a set of legal and political arguments and tools rendering that consciousness the intellectual background of legal argumentation - the *langue* of legal discourse.

### A. Classical Legal Thought

During the heyday of Classical Legal Thought (CLT) – from approximately 1850 until 1914<sup>5</sup> - contractual thinking presented the blue print within which relations between individuals on the one hand as well as between countries on the other could be framed. CLT was characterized by a clear distinction between the public and the private, by individualism, and, interpretive formalism.

Contract law and will-theory stood in the center of this legal consciousness. In CLT, the contract and private law rules were a set of rational derivations from the first order principles: the individual and his will<sup>6</sup> were to be protected by governments as the rights of legal persons.<sup>7</sup> One may express the gist of this thinking as follows: I have private/sovereign rights and I owe no obligations toward others, save the harm principle. Individuals internally, and 'civilized' nations externally, could pursue their interests with minimal external interference,

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<sup>3</sup> Case C-621/18, *Andy Wightman and Others v Secretary of State for Exiting the European Union*

<sup>4</sup> *Ibid.*

<sup>5</sup> Kennedy, "The Three Globalizations of Law and Legal Thought", p. 25.

<sup>6</sup> For a critique see Randy E. Barnett, "A Consent Theory of Contract", 86 *Colum. L. Rev.* 269 (1986).

<sup>7</sup> Kennedy, Duncan. "The Three Globalizations of Law and Legal Thought", p. 26; Kennedy, Duncan. "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form", 100 *Colum. L. Rev.* 94 (2000)

subject eventually to agreements accorded in line with their own preferred terms and conditions in disregard to potential power differentials.<sup>8</sup>

## B. The Social

The dissatisfaction that arose in revolt of CLT began to ferment in the late 1800s, and provided a forum which allowed for the embrace of a new legal consciousness, spreading from the “Western” hemisphere across the world. Beginning in the early 1900s therefore, and lasting until the end of World War II, a reconstruction process was set in motion based on fundamental shifts from individualism to the interdependence and group rights, from formal equality to social justice and from private law as its core to social legislation. The second globalisation embedded a collective element, protecting individuals as constitutive elements of particular groups of society. The social, in these terms, constituted an outright attack on the individualist nature of CLT.

We understand, therefore, the second globalization of legal thought as the development of a legal consciousness that bestrode the will of individuals,<sup>9</sup> and to some extent sovereign nations, paving the way for arguments pertaining to interdependence and cooperation.<sup>10</sup> Internally, in regulatory terms, the law of the free market was slowly replaced by a new regulatory regime where market freedoms were balanced against radiating social concerns that aimed at protecting groups in society e.g. workers, women, the disabled. In the international domain, the cooperation remained however hierarchical and exploitative - the League of Nations and Mandate system was succeeded by the United Nations, Bretton Woods, and a (failed) attempt to create World Trade Organisation. Colonialism and economic exploitation in international proved much slower to wane.<sup>11</sup>

## C. Neo-formalism

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<sup>8</sup> Indeed, it was for the above reasons that the imperialism of contract was a construct that held significant theoretical and practical weight during the first globalisation. In essence, everything was considered in a contractual light and therefore reduced to elements of a transaction – the will of the actors was key. According to The Will Theory, commitments made between parties to a contract were enforceable before courts because the parties freely chose to be bound by the contractual agreement.

<sup>9</sup> Take for example, the development of labour law around which a legal *langue* aiming to reign-in the freedom of contract ideology and the regulation of private relations based solely on the will of the parties was developed. In this regard, we note that although freedom of contract remained intact, the Social paved the way for the imposition of obligations on, for example, employers, obligations essentially based on the recognition of social responsibilities and the development of the idea of social protection.

<sup>10</sup> Kennedy, “The Three Globalizations of Law and Legal Thought”.

<sup>11</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, vol. 37 (Cambridge University Press, 2007).

Neo-formalism grew from an increased importance weighted on human and democratic rights, the rule of law, across the world. This third globalization, what Kennedy refers to as the contemporary period, is more concerned with recognising and managing difference. In Kennedy's own words:

*Between 1945 and 2000, one trend was to think about legal technique, in the aftermath of the critiques of CLT and the social, as the pragmatic balancing of conflicting considerations in administering the system created by the social jurists. At the same time, there was a seemingly contrary trend to envisage law as the guarantor of human and property rights and of intergovernmental order through the gradual extension of the rule of law, understood as judicial supremacy.<sup>12</sup>*

The *langue* of neo-formalism saw a shift from individual rights and property rights that characterized the first globalization, and from group rights and social rights that marked the globalization of the social consciousness, to an increased focus on human rights in terms of policy analysis, policy making and, more importantly for our scope here, adjudication.

To sum up, during the CLT the *langue* was based on a formalistic consensus of wills, the rights of individuals/states and a disregard of power disparities or vulnerability. During the second globalisation, the Social, more room was made for collective considerations and instrumental approaches to law, for social justice and protection. Towards the end of the Social, we see the emergence of an identity-based notion of rights, marking the beginning of the neo-formalist legal consciousness. During the spread of Neo-Formalism, the social project is reintegrated into the legal discourse at the level of arguments about constitutional rights and balancing policy and identity. In this legal consciousness, political disputes are portrayed as legal disputes about the scope of one's rights, taking social justice into account as part of identity rights.

### **III. Wightman and Others**

On the 10 December 2018, the CJEU, in the context of a preliminary reference referred by the Court of Session, Inner House, First Division (Scotland, United Kingdom), handed down its seminal judgment in what has become known as 'the Brexit case'. One short and concise question was referred for interpretation by the Court: Where, in accordance with Article 50 [TFEU], a Member State has notified the European Council of its intention to withdraw from the European

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<sup>12</sup> Kennedy, Three Globalisation of Legal Thought, p. 22.

Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the European Union? A short and concise question with potential explosive effects given the possibility that any answer in the affirmative would pave the way to a third option for the UK, that is, to remain in the European Union.

#### A. Opinion of Advocate General Campos Sánchez-Bordona

After having rejected the pleas concerning the admissibility of the question referred to the Court<sup>13</sup>, the Advocate General embarked on a three-step analysis<sup>14</sup>. Firstly, he looked at the rules of public international law on the withdrawal of States from international treaties emphasising that the rules applicable under the Vienna Convention on the Law of Treaties can provide interpretative guidance for the case at hand since the principle question is not expressly dealt with in Article 50 TEU.<sup>15</sup> Secondly, the Advocate General proceeds to carry out a literal and contextual interpretation of Article 50. Through this interpretation, he emphasized the unilateral nature of a State's decision to withdraw from the EU linking that to an expression of that State's sovereignty, conditional only upon a State's constitutional requirements.<sup>16</sup> In view of this construction, he opines that any revocation of an exit decision must also be considered as a manifestation of the sovereignty of the departing State<sup>17</sup> any that any decision to the contrary risks to deny common sense entailing a forced exit or even an indirect expulsion from the EU.<sup>18</sup> Indeed, in the view of the Advocate General, the notification decision of the UK can only indicate an intention to withdraw consequently opening up a two-year period of negotiations during which the departing State remains a Member State of the Union maintaining all rights that is implied with that membership until the withdrawal becomes effective.<sup>19</sup> In this regard, and in view of actual and current membership in the EU, the Advocate General references the principle of respect for the constitutional identity of the Member States, which, he submits, supports taking into account a change in the sovereign will of the departing State<sup>20</sup>. On this aspect, he links the objective of

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<sup>13</sup> The UK government had argued that the question referred was inadmissible firstly due to its hypothetical and theoretical nature, and secondly, because the Court has no competency to provide advisory opinions on constitutional matters.

<sup>14</sup> We will not analyse the third step as it concerns the question of an agreed revocation relevant only to the extent Court were to reject the possibility of unilateral revocation. However, the judgment of the Court, at para 72, rejected the possibility of a multilateral revocation on the basis it would transform a unilateral sovereign right into a conditional right subject to an approval procedure.

<sup>15</sup> Para. 82.

<sup>16</sup> Paras. 91 – 93.

<sup>17</sup> Para. 94.

<sup>18</sup> Para. 110 – 112.

<sup>19</sup> Paras. 95 – 102 & 114 – 115.

<sup>20</sup> Para. 130 – 132

achieving an ever closer Union in submitting that a Member State should not be obstructed from continued EU membership<sup>21</sup> since any such obstruction would negate the rights acquired by EU citizens.<sup>22</sup> Bearing in mind the above arguments in favour of unilateral revocation, the Advocate General outlines the conditions under which unilateral revocation would be valid noting that revocation should be carried out via a formal act of the departing State addressed to the European Council and should be adopted in accordance with national constitutional requirements. He notes the potential for abuse recalling that it is limited by the principles of good faith and sincere cooperation.<sup>23</sup>

## B. Judgment of the Court

The Judgment of the Court was delivered on the 10 December 2018. In setting out the provisions considered relevant to its judgment, that is, relevant provisions of the Vienna Convention, the relevant EU law including Articles 1 and 2 of the TEU and the text of the withdrawal clause of Article 50 and the relevant provisions of UK law, the Court delineates the legal framework within which its analysis is confined. It then proceeds with an analysis of the admissibility of the preliminary reference confirming the existence of a dispute between the parties and the relevance of the question referred which requires an interpretation of a provision of EU law. The Court concludes by finding the reference to be admissible.

The judgment proceeds to examine the substance of the dispute before it noting that despite Article 50's the silence on revocation of withdrawal from the Union, that same Article 50, in paragraph 2, refers explicitly to the notification of the 'intention' to withdraw. The Court notes that such an 'intention' can neither be definitive nor irrevocable<sup>24</sup> and is supported by the fact that Article 50(1) provides for unilateral withdrawal dependent solely on the sovereign choice of the Member State concerned.<sup>25</sup> In delineating the purpose of Article 50, the Court notes its two objectives, firstly, to enshrine the sovereign right of a Member State to withdraw from the EU, and secondly, to ensure that such a withdrawal takes places in an orderly fashion.<sup>26</sup> Endorsing the opinion of the Advocate General, the Court notes that the first objective of Article 50 supports the conclusion of a unilateral right to revoke notification until such time as a withdrawal agreement has not entered into force or

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<sup>21</sup> Para. 133.

<sup>22</sup> Para. 135-136.

<sup>23</sup> Para. 148 & 156.

<sup>24</sup> Para 49.

<sup>25</sup> Para 50.

<sup>26</sup> Para 56.

for as long as the two-year negotiation period and any possible extension has not expired.<sup>27</sup> In doing so, the Court recognises the sovereignty of a State in deciding to retain its status as a Member State.<sup>28</sup> In referencing the principle of an ever closer union among the peoples of Europe, and the values of liberty and democracy<sup>29</sup> the Court notes that since a State cannot be forced to accede, against its will, to the Union<sup>30</sup> neither can it be forced to withdraw unwillingly. Any interpretation of the of notification of an intention to withdraw from the Union which would translate to an inevitable withdrawal would amount to an exit inconsistent with the aims and values of the EU and the purpose of creating an ever closer union.<sup>31</sup> Furthermore, in the opinion of the Court, any such interpretation would produce negative consequences with regard to the rights of all Union citizens, effectively undermining the status of citizenship of the Union which is intended to be the fundamental status for all nationals.<sup>32</sup> The final decision of the Court therefore found that

*“Article 50 TEU must be interpreted as meaning that, where a Member State has notified the European Council, in accordance with that article, of its intention to withdraw from the European Union, that article allows that Member State — for as long as a withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired — to revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements. The purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end”.*

#### **IV. Wightman Through the Lens of the Three Globalisations (and beyond?)**

What, if any, of the various elements of the legal *langues* pertaining to the Three Globalisations can be identified in the Court’s judgment? And what can we learn from Wightman and the way it was decided about the status of the EU project?

To recall, the first globalization of Classical Legal Thought was centred on legal formalism: the idea that law provided facilitative rules, formal equality and procedural fairness. In other words, the rules of the game applied to all in the same way – even if the outcomes were manifestly unjust. We portray this legal consciousness as ‘law without politics’. The second

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<sup>27</sup> Para 57.

<sup>28</sup> Paras 59 and 60.

<sup>29</sup> Paras 61-63.

<sup>30</sup> Article 49 TEU.

<sup>31</sup> Paras 63 and 65-67.

<sup>32</sup> Para 64.

globalization, The Social, on the other hand, was typified by an understanding of ‘law as the extension of politics’. Law in this period was overlain with an increased awareness of social obligations and the idea of social protection. When we come to the third globalization, Neo-formalism, we witness a change in legal grammar in an attempt to integrate ‘politics in/through law’, via rights discourse and the emergence of identity rights.

Upon a first reading, Wightman reverts to the *langue* of the CLT. The importance the Court gives to will, and the sovereignty of the Member State in question, is remarkable. The Court specifically notes, in paragraphs 65-66 that

*“In those circumstances, given that a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will. However, if the notification of the intention to withdraw were to lead inevitably to the withdrawal of the Member State concerned from the European Union at the end of the period laid down in Article 50(3) TEU, that Member State could be forced to leave the European Union despite its wish — as expressed through its democratic process in accordance with its constitutional requirements — to reverse its decision to withdraw and, accordingly, to remain a Member of the European Union.”.*

This is a clear expression of a Member State’s freedom and autonomy – States are free to join the Union, and they are free to leave. Therefore, Article 50 should be interpreted in such a way that any intention to leave the Union can be revoked in a unilateral fashion.

Yet there is another level of argument at play: in paragraphs 61, 62 and 64, immediately before pronouncing its opinion on the notification of intention to withdraw, the Court states that

*“As regards the context of Article 50 TEU, reference must be made to the 13th recital in the preamble to the TEU, the first recital in the preamble to the TFEU and Article 1 TEU, which indicate that those treaties have as **their purpose the creation of an ever closer union among the peoples of Europe**, and to the second recital in the preamble to the TFEU, from which it follows that the European Union **aims to eliminate the barriers which divide Europe**. It is also appropriate to underline the importance of **the values of liberty and democracy**, referred to in the second and fourth recitals of the preamble to the TEU, which are among the common values referred to in Article 2 of that Treaty and in the preamble to the Charter of Fundamental Rights of the European Union, and which thus form part of the very foundations of the European Union legal order [...] It must also be noted that, since **citizenship** of the Union is intended to be the **fundamental status of nationals of the Member States** [...] any withdrawal of a Member State from the European Union is liable to have a **considerable impact on the rights of all Union citizens**, including, *inter alia*, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States.”*

These three paragraphs of the judgment seem to catapult the discussion into the political field. By saying that Article 50, a provision that at first sight seems to be of a purely procedural nature, should be interpreted in light of the overall aim of the Union as expressed in the Treaties, values of liberty and democracy, the Charter of Fundamental Rights and the impact any withdrawal from the Union would have on EU citizens, the Court openly politicizes the interpretation of Article 50 and links it to these European values. By interpreting the will of the Member State in line with European values, the Court recognizes the links between national law and politics on the one hand and European law and politics on the other and incorporates, in its reasoning, national politics in advancing the European society-building project. In fact, in advancing the latter within the confines of considerations pertaining to the will of the State, the Court inadvertently encourages/burdens the Member State to consider the European society-building project in making any eventual decision to revoke, or not, its intention to exit the Union. In our view, this tends to go beyond the gist of Neo-formalist thinking in the EU which has dominated EU law, and, more specifically, the CJEU's jurisprudence in recent decades.

In order to demonstrate, let us recall what we consider to be two of the main markers of the EU's globalisation – both neo-formal in nature. Firstly, since the publication of the 1985 White Paper on the Completion of the Internal Market, we have seen an important re-constitution of the relation between law and politics in the EU. As noted by Micklitz, the White Paper constituted “*the starting point for the ongoing transformation of the European Community into a new supranational polity*”, where, in a uniquely neo-formalist move, the EU's common and later internal market was presented as technical project. The portrayal of the internal market as a technical exercise may have eased the political acceptance of regulations and directives, however, it also limited the politicisation of the EU internal market, downplaying the re-distributive and political nature of its regulation.

Secondly, EU citizenship has played a significant role in the neo-formal turn of the European project. In this regard, we note a marked shift from market and consumer citizens, that is, those citizens that were afforded specific rights (and duties) by virtue of their participation in the internal market project, to, eventually, what we recognise as the development of standalone citizens that derive rights (and duties) by virtue of that very status, a status that has been significantly built upon by the broad interpretation given to it by the CJEU. What we note is that, with regard to the former, rights and duties conferred by way of being a market player constructed a sort of dependency relationship between the Union as the addressor and

the nationals of the Member States as the addressees. In more recent times though, and as can be deciphered from the judgment, the latter has developed into a status that weakens the market dependency element and rather sees a concept develop which produces its own legal effects.

In *Wightman*, and despite the opposition of the European Commission and the Council, and in an even more unequivocal fashion than the Advocate General, the Court moves to judge on the one hand with a clear CLT consciousness but, with reference to essential elements of the European project thereby rather recalling the legal-political consciousness of the Social. Indeed, by setting the scene for a possible unilateral revocation that unshackles national politics from supranational constraints (i.e. the agreement of the European Council) the Court gives large space to national politics, more voice to the British citizens and also ensures that the least number of constraints are placed on making sure that EU citizens remain so.

The Court takes this recognition even further, when in another conspicuously anti-neo-formalist move, the CJEU refuses to place additional legal safeguards against the abuse of the right to unilateral revocation, such as those for instance suggested by the AG. While the revocation of the ‘intention to withdraw’ has to be a genuine expression of EU citizens to remain in the EU, the quality of consent is not framed in legal terms of good faith and sincere cooperation, but rather left on the backdrop of political trust in the EU-British citizens and their constitutional procedures.

## **V. Conclusion**

The *Wightman* and *Others* judgment may be a special case in the EU jurisprudence. In view of the pending Brexit, we can safely say that the EU may be at its lowest point for what concerns its pursuit of ‘the ever closer union’. Yet, it is perhaps at this moment that EU *law* is at its best.

Firstly, in rejecting the stance of the Commission and the Council on the form any revocation must take, the Court casts away any assumed position of strength the latter may have vis-à-vis the UK. Secondly, the Court, by embedding the discussion about UK sovereignty in the language of EU values and EU citizenship, manages to assert the extensiveness of the UK’s sovereign rights within the context of the extensiveness of the political and democratic rights of EU-British citizens. Finally, the Court also makes clear that this status cannot be taken

from the EU-British citizens by their fellow EU citizens, or the countries which represent them. On this reading, we forward that the Court is therefore going beyond strict neo-formalism in upholding the will of the Member State but moving that classical consciousness beyond the economic union and any reduction to a give-take relationship. In the Union of the *Wightman and Others*, the politics and democratic rights of all citizens seem to have found their rightful place. Another contribution would be merited to explain why the Court has treated national politics in a very different manner in the economic crisis case law.<sup>33</sup>

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<sup>33</sup> Harm Schepel, “The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone,” *Journal of Law and Society* 44, no. 1 (March 1, 2017): 79–98.